

1272 NEGLECT OF PATIENTS AND RESIDENTS — § 940.295**Statutory Definition of the Crime**

Neglect of patients and residents, as defined in § 940.295 of the Criminal Code of Wisconsin, is committed by one [(in charge of) (employed in)] (name type of facility)¹ who [intentionally neglects] [recklessly neglects] [neglects]² a [(patient) (resident)] of that [(facility) (program)] (or who knowingly permits another person to do so)³ under circumstances that (are likely to) cause [death] [great bodily harm] [bodily harm].

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (in charge of) (employed in) (name of facility).⁴
2. (Name of victim) was a (patient)⁵ (resident)⁶ of (name of facility).⁷
3. (Name of facility) was a (type of facility).⁸

[(Type of facility) means (use the applicable statutory definition, if any).]

4. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim).⁹

“Neglect” means creating significant risk to the physical or mental health of an individual by the failure of a caregiver to endeavor to secure or maintain¹⁰ adequate care, services, or supervision for that individual.

IF INTENTIONAL NEGLIGENCE IS ALLEGED, ADD THE FOLLOWING:

["Intentionally" means that the defendant acted with the mental purpose to neglect (name of victim).¹¹

IF RECKLESS NEGLIGENCE IS ALLEGED, ADD THE FOLLOWING:

["Recklessly" means that the defendant's conduct created a situation of unreasonable risk of harm to, and demonstrated a conscious disregard for the safety of, the (patient) (resident).]¹²

5. The defendant [intentionally neglected] [recklessly neglected] [neglected] (name of victim) under circumstances that [(were likely to cause) (caused)] [death] [great bodily harm] [bodily harm].¹³

["Cause" means that the defendant's conduct was a substantial factor in producing (death) (great bodily harm) (bodily harm)].¹⁴

["Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury].¹⁵

["Bodily harm" means physical pain or injury, illness, or any impairment of physical condition].¹⁶

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE DEFENDANT IS CHARGED WITH ABUSE OF A PATIENT OR RESIDENT WHO IS AN “INDIVIDUAL AT RISK”:¹⁷

If you find the defendant guilty, you must answer the following question:

Was (name of victim) an individual at risk?

CHOOSE ONE OF THE FOLLOWING DEFINITIONS

[“Individual at risk” means a person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.]¹⁸

[“Individual at risk” means an adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.]¹⁹

If you are satisfied beyond a reasonable doubt that (name of victim) was an individual at risk, you should answer the question “yes.”

If you are not so satisfied, you must answer the question “no.”

COMMENT

Wis JI-Criminal 1272 was originally published in 1999 and revised in 2003, 2007, 2008 and 2011. The 2007 revision reflected changes made by 2005 Wisconsin Acts 264 and 388. The 2008 revision updated statutory references in footnotes 17-19 to reflect changes made by 2007 Wisconsin Act 45. The 2011 revision added reference to 2011 Wisconsin Act 2 to the Comment. This revision was approved by the Committee in February 2021; it amended the definition of “neglect” under element four to mirror § 46.90(1)(f).

This instruction is drafted for offenses involving intentional, reckless or neglect of patients or residents. The statute also prohibits intentional, reckless or negligent abuse. If a case involves a charge of abuse as opposed to neglect, use Wis JI-Criminal 1271.

Section 940.295 recognizes a variety of harms and a variety of mental states. The Committee concluded that the best way to address the considerable complexity that has resulted is to provide a single model instruction which can be modified to refer to the appropriate mental state and degree of harm. This has resulted in the use of many brackets and parentheses. To illustrate that the instruction becomes simpler when proper selection of alternatives is made, an example is provided at Wis JI-Criminal 1271 EXAMPLE.

Section 940.295, as amended by 2005 Wisconsin Acts 264 and 388, defines the following offenses involving neglect of patients or residents.

<u>Offense</u>	<u>Penalty</u>
Intentionally or recklessly neglect a patient or resident and cause death to an individual at risk	Class C felony
Simply* neglect a patient or resident and cause death to an individual at risk	Class D felony [sub. (3)(b)1g.]
Intentionally, recklessly, or simply* neglect a patient or resident and cause great bodily harm to an individual at risk	Class E felony [sub. (3)(b)1m.]
Intentionally neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class F felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that are likely to cause great bodily harm	Class G felony [sub. (3)(b)1r.]
Intentionally neglect a patient or resident under circumstances that cause bodily harm	Class H felony [sub. (3)(b)2.]
Intentionally neglect a patient or resident under circumstances that are likely to cause bodily harm	Class I felony [sub. (3)(b)2.]
Recklessly or simply* neglect a patient or resident under circumstances that cause great bodily harm [to other than an individual at risk]	Class H felony [sub. (3)(b)3.]
Recklessly or simply* neglect a patient or resident under circumstances that are likely to cause bodily harm	Class A misdr. [sub. (3)(b)4.]
Intentionally, recklessly, or simply* neglect a patient or resident under circumstances not causing and not likely to cause bodily harm	Class B misdr. [sub. (3)(b)5.]

* “Simply” is used to refer to offenses under sub. (3)(a)3. alleging only “neglect” in order to distinguish them from offenses requiring “intentional neglect” or “reckless neglect.” This approach is based on reading sub. (3)(a)3. with “negligently” modifying only “abuses,” not “neglects.” Thus, the instruction presents three options: “intentionally neglects”; “recklessly neglects”; or, “neglects.”

Because the statute defines so many different offenses, there is the potential for a variety of lesser included offense questions. One potential question is easily resolved: a special subsection of § 939.66 provides that all less serious violations of § 940.295 are included offenses of more serious violations. See § 939.66(6e).

Two general categories of variables govern the lesser included offense possibilities. First, there may be a different mental state. The statute provides three alternatives: intentionally, recklessly, or simply neglecting a patient or resident. Second, the abuse may have occurred under circumstances involving different levels of harm. Causing death, great bodily harm or bodily harm; likely to cause great bodily harm or bodily harm; and, not causing and not likely to cause bodily harm.

Presenting lesser included offenses in a way that will be understandable to the jury is a challenge. One approach would be the traditional long form, whereby a complete instruction on the charged offense would be followed by a complete instruction on each applicable lesser included offense. This has the serious disadvantage of resulting in a set of instructions that might be very long and repetitious. However, depending on the lessers and the complexity of their relationship to the charged crime, this may be the most effective way to approach the problem. The other approach would be use the shorter form described in Wis JI-Criminal 112A: specifying the difference between the charged crime and the lesser included crime and instructing the jury on that difference.

2011 Wisconsin Act 2 amended § 940.295 to add an exception to the version of the offense defined in sub. (3)(a)3.: abuses, with negligence, or neglects a patient or resident. Subsection (3)(am) is created to read:

(3)(am) Paragraph (a)3. does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

“Health care provider” is defined in one other Criminal Code statute. Section 940.20(7)(a)3. provides: “‘Health care provider’ means any person who is licensed, registered, permitted or certified by the department of health services or the department of regulation and licensing to provide health care services in this state.” The usual practice in Wisconsin is to treat statutory exceptions like affirmative defenses: If there is some evidence of the exception, the burden is on the state to prove that the exception does not apply. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon, which recommends adding an element where there is a claim that the defendant was a peace officer; peace officers are subject to an exception from the ban on carrying concealed weapon in § 941.23.

1. Here specify the type of facility involved, such as “an adult day care center.” The facilities covered by the statute are listed in sub. (2) of § 940.295:

(2) Applicability. This section applies to any of the following types of facilities or programs:

- (a) An adult day care center.
- (b) An adult family home.
- (c) A community-based residential facility.
- (d) A foster home.
- (e) A group home.
- (f) A home health agency.
- (g) A hospice.
- (h) A inpatient health care facility.
- (I) A program under § 51.42(2).
- (j) The Wisconsin Educational Services Program for the Deaf and Hard of Hearing under § 115.52 and the Wisconsin Center for the Blind and Visually Impaired under § 115.525.
- (k) A state treatment facility.
- (l) A treatment facility.
- (m) A residential care center for children and youth operated by a child welfare agency licensed under § 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.
- (n) Any other health facility or care-related facility or home, whether publicly or privately owned.

2. The bracketed material is intended to allow choice of the relevant alternatives which are described as follows in sub. (3)(a):

- intentionally abuses or intentionally neglects [(a)1.]
- recklessly abuses or recklessly neglects [(a)2.]
- negligently abuses or neglects [(a)3.]

This approach is based on reading the last alternative with “negligently” modifying only “abuses,” not “neglects.” Thus, the instruction presents three options: “intentionally neglects”; “recklessly neglects”; or, “neglects.”

3. Read the phrase in parentheses if the case is based on the defendant permitting another to neglect a patient or resident. In that case, the fourth and fifth elements must be modified. Footnote 9 suggests a modification of the fourth element for “knowingly permits” case. Footnote 13 suggests a modification for the fifth element.

4. Here specify the name of the facility, for example: “The Fairview Care Center.”

5. An extensive definition of “patient” is provided in § 940.295(1)(L). If a definition of that term is believed to be necessary, the applicable part of the statutory definition should be added to the instruction.

6. “Resident” is defined as follows in § 940.295(1)(p): “‘Resident’ means any person who resides in a facility under sub. (2).”

7. Here specify the name of the facility, for example: “The Fairview Care Center.”

8. The name of the facility should be used in the first blank; the type of facility listed in sub. (2) should be used in the second blank. For example: “3. The Fairview Care Center was an adult day care center.”

The second sentence allows for providing a definition of the type of facility involved. Cross-references to statutory definitions for many of the types of facilities are provided in sub. (1) of § 940.295:

<u>Facility</u>	<u>Definition</u>
- adult family home	§ 50.01(1)
- community-based residential facility	§ 50.01(1g)
- foster home	§ 48.02(6)
- group home	§ 48.02(7)
- home health agency	§ 50.49(1)(a)
- hospice	§ 50.90(1)
- inpatient health care facility	§ 50.135(1)
- state treatment facility	§ 51.01(15)
- treatment facility	§ 51.01(19)

“Adult day care center” is defined in § 49.45(4), although that definition is not cross-referenced in § 940.295.

9. If the case is based on the defendant knowingly permitting another to neglect a patient or resident, the fourth element should be changed to read as follows:

4. The defendant knowingly permitted another person to [intentionally neglect] [recklessly neglect] [neglect] (name of victim).

10. This definition is based on the one provided in s. 46.90(1)(f), which applies because it is cross referenced in s. 940.295(1)(k). Section 46.90(1)(f) provides:

(f) "Neglect" means the failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. "Neglect" does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do not resuscitate order under ch. 154, a power of attorney for health care under ch. 155, or as otherwise authorized by law.

This definition was addressed in an unpublished single-judge opinion concluding that the term “neglect,” as provided in s. 940.295(3)(a)3. does not contain a mens rea requirement. State v. Murphy, 2020 WI App 70, 394 Wis.2d 523, ¶18, 950 N.W.2d 691.

11. This applies the common definition of criminal intent – mental purpose to cause the result – to the potentially confusing concept of “intentional neglect.” The Committee interpreted this to mean that the defendant must act with the purpose to neglect a patient or resident, with “neglect” given its statutory meaning.

12. This definition of “recklessly” is the one provided in § 940.295(1)(o). It differs from the general definition of “recklessness” in § 939.24 in two respects. First, it refers only to an “unreasonable” risk; § 939.24 requires an unreasonable “and substantial” risk. Second, it refers to “conscious disregard for the safety . . .”; § 939.24 refers to being “aware of the risk.” The latter is not believed to be a substantive

difference – “conscious disregard” was used in the definition of reckless homicide before the revision in 1989 when it was changed to clarify that a subjective mental state was required.

13. Here insert the appropriate level of harm from the options provided in § 940.295(3)(b). The different levels and the associated penalties are summarized in the Comment preceding footnote 1.

If the case is based on the defendant knowingly permitting another to abuse a patient or resident, the fifth element should be changed to read as follows:

5. The defendant knowingly permitted another person to [intentionally] [recklessly] [negligently] abuse (name of victim) under circumstances that [caused death] [(caused) (were likely to cause) great bodily harm] [(caused) (were likely to cause) bodily harm].

14. If a more extensive definition of “cause” is necessary, see Wis JI-Criminal 901.

15. See § 939.22(14) and Wis JI-Criminal 914.

16. This is the definition provided in § 939.22(4) and in § 46.90(1)(aj).

17. The penalties set forth in subs. (3)(b)1g. and 1m. apply where death or great bodily harm is caused to an “individual at risk.” The Committee concluded that this could be most efficiently handled by presenting the issue as a special question for the jury to consider if they find the defendant guilty of the basic offense. The definitions of “individual at risk” are those provided in sub. (1)(ag), (cr), and (hr) of § 940.295.

18. Section 940.295(1)(hr) provides: “‘Individual at risk’ means an elder adult at risk or an adult at risk.” Section 940.295(1)(cr) provides that “‘elder adult at risk’ has the meaning given in s. 46.90(1)(br).” The definition in the instruction is the definition provided in s. 46.90(1)(br) without change.

19. Section 940.295(1)(cr) provides: “‘Individual at risk’ means an elder adult at risk or an adult at risk.” Section 940.295(1)(ag) provides that “‘adult at risk’ has the meaning given in s. 55.01(1e).” The definition in the instruction is the definition provided in s. 55.01(1e) without change.